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Nos. 94-66 and 94-82

In the Supreme Court of the United States

OCTOBER TERM, 1994

MIKE MOORE, ET AL., APPELLANTS

v.

JOHNNY DUPREE, ET AL.

LAMAR COUNTY BOARD OF EDUCATION AND TRUSTEES, ET AL., APPELLANTS

v.

JOHNNY DUPREE, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

In light of the Mississippi Supreme Court's holding in *Greenville Public School District* v. *Western Line Consolidated School District*, 575 So. 2d 956 (Miss. 1990), cert. denied, 112 S. Ct. 1512 (1992), that Miss. Code Ann. § 37-7-103 (1972 & Supp. 1990) supersedes Miss. Code Ann. § 37-7-611 (1972) and repeals it by implication, what remedy, if any, can a federal court offer for failure to preclear Section 47 of the Education Reform Act, 1986 Miss. Gen. Laws ch. 492, which also purported to repeal § 37-7-611?

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In the Supreme Court of the United States

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LAMAR COUNTY BOARD OF EDUCATION AND TRUSTEES, ET AL., APPELLANTS

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This submission responds to the Court's invitation to the Solicitor General to file a brief expressing the views of the United States.

STATEMENT

This case is before the Court for a second time. It involves the question whether the State obtained preclearance from the Attorney General under Section 5

of the Voting Rights Act of 1965, 42 U.S.C. 1973c, for certain statutory changes affecting voting that were a part of legislation the State enacted in 1986. It also involves the question of what remedies a federal court may order for the State's failure to obtain such pre-clearance.

1. Prior to 1986, Mississippi law provided for two entirely different ways in which municipal school district boundaries could be altered.

First, municipal school district boundaries could be enlarged "non-consensually" when the city in which the district was located annexed territory from a neighboring political unit. Under the relevant pre-1986 statute—Miss. Code Ann. § 37-7-611 (1972) (Section 611)—when a city with a municipal school district annexed territory from the same or a neighboring county, the municipal school district automatically expanded to become coextensive with the new city limits. This expansion occurred as a matter of law, regardless of the consent of the relevant county board of education or school board of the district losing the territory. See J.S. App. 10a-11a & n.6.

Second, municipal school district boundaries could also be enlarged (or diminished) "consensually," when both the county board of education and the municipal school district board agreed on the change. See Miss. Code Ann. § 37-7-103 (1972) (J.S. App. 122a). In such cases, no municipal annexation or other change to any other political boundary would be involved.

Under Mississippi law, the school board of a municipal school district is ordinarily chosen by the city's elected governing body. Miss. Code Ann. § 37-7-203 (1990). Members of non-municipal school district boards, on the other hand, are ordinarily directly elected by county voters. Miss. Code Ann. § 37-7-207 (1990).

2. In 1986, the state legislature enacted the Uniform School Law, S.B. No. 2117, 1986 Miss. Laws ch. 492, omnibus legislation revising the entire state education code. Among the many changes effected by this statute, Section 47 of the new statute specifically repealed 23 provisions of state law, including Section 611's provision for non-consensual enlargement of municipal school district boundaries upon a city's annexation of territory. J.S. App. 121a. In addition, Section 52 of the new statute (J.S. App. 122a-123a) made some amendments to the consensual system for school district boundary changes provided for in Miss. Code Ann. § 37-7-103.

3. In July, 1986, the Attorney General of the State of Mississippi submitted the Uniform School Law to the Attorney General of the United States for preclearance under Section 5. J.S. App. 12a. The State's submission included a copy of the new statute, a letter from the state attorney general, and a 467-page, loose-leaf notebook entitled "Senate Bill Number 2117—Comparison of Current and New Law." *Id.* at 78a, 93a-152a.

The state attorney general's letter stated that the "'Mississippi Uniform School Law of 1986' * * * is submitted * * * in its entirety." J.S. App. 81a. The letter continued: "For the sake of brevity, the submission will only set forth the particular sections which deal primarily with voting rights even though the complete act is submitted for review." *Ibid.* Thirteen of the 205 sections in the bill were discussed in the letter. The loose-leaf notebook contained the text of every provision of the Uniform School Law, together with photocopied pages containing the provisions of prior state law, if any, that were to be amended by each provision.

a. The State's letter did not discuss Section 47, which repealed Section 611. J.S. App. 13a. The text of Section

47 consists entirely of a statement that 23 cited provisions of state law—including Section 611—that "provide for the creation and operation of municipal separate school districts[] are hereby repealed." *Id.* at 121a. Although the accompanying notebook included the text of Section 47, it did not include the texts of the 23 provisions to be repealed.

b. The State's letter did discuss Section 52, which amended the method of altering school district boundaries with the consent of the school boards involved. The letter explained that Section 52 changed existing law by allowing any school board to engage in mutually agreed-upon transfers of school district territory with adjacent districts, including municipal school districts, without the consent of the county school board, as previously required. J.S. App. 83a. In describing Section 52, the letter did not mention Section 611 of the old law in this connection. The loose-leaf notebook accompanying the letter compared the text of Section 52 with the text of the statutory provision it replaced. *Id.* at 122a-123a. The notebook did not otherwise explain the effect that the enactment of Section 52 had on existing law.

On August 29, 1986, the Assistant Attorney General for Civil Rights, acting on behalf of the Attorney General of the United States (see 28 C.F.R. 51.3), informed the State that the Attorney General did "not interpose any objection to the voting changes occasioned by [the Uniform School Law] as identified in your July 22, 1986, letter." J.S. App. 14a, 156a.

4. More than one year later, on December 30, 1987, the State expressly and separately submitted the repeal of Section 611 by Section 47 of the Uniform School Law for preclearance to the Department of Justice. J.S. App. 158a-168a. The submission explained that Section 47

repealed Section 611, and it outlined the nature of that change. In distinguishing Section 47 from Section 52, the submission stated:

> *It is the automatic expansion of the school district which has been repealed by the instant submission.* The option to expand, however, is not forclosed [*sic*]. Section 52, of the Chapter 492 of the 1986 Laws of Mississippi (precleared by the United States Justice Department on August 29, 1986) provides that the school board of any school district may abolish such existing district or reorganize, change or alter the boundaries of any such school district.

Id. at 164a (emphasis added). In response to the submission, the Attorney General requested additional information from the State, which was ultimately provided. On March 31, 1989, the Attorney General interposed an objection to the repeal of Section 611. *Id.* at 183a-186a. The State asked the Attorney General to reconsider his objection. *Id.* at 187a-216a. On May 25, 1990, the Attorney General advised the State that the objection would not be withdrawn. *Id.* at 217a-221a.

5. After the enactment of the Uniform School Law, J.S. App. 6a, the City of Hattiesburg, Mississippi, annexed neighboring territory in Forrest and Lamar Counties, by filing a petition for annexation in state chancery court and obtaining a favorable ruling on that petition. See Miss. Code Ann. §§ 21-1-27 *et seq.* (1990 & Supp. 1994). On February 23, 1990, plaintiffs—residents and voters of the City of Hattiesburg and members of the Board of Trustees of its municipal school district—filed this suit in the United States District Court for the Southern District of Mississippi pursuant to Section 5 of the Voting Rights Act of 1965, naming as defendants the State of Mississippi and its governor and attorney

general. J.S. App. 46a-47a. Plaintiffs sought, *inter alia*, to enjoin enforcement of the 1986 Uniform School Law, insofar as it repealed Section 611.[1] After a three-judge court was convened, the two affected county school districts (those of Lamar and Forrest Counties) and their trustees intervened as defendants. *Id.* at 47a. The United States filed a brief as amicus curiae in support of plaintiffs, arguing that the repeal of Section 611 had not been precleared and that it therefore could not go into effect. *Id.* at 47a n.2.

On April 2, 1991, the three-judge district court held that the Attorney General had precleared the 1986 repeal of Section 611 when he failed to interpose any objection to the State's 1986 submission. J.S. App. 45a-73a. The court refused to enjoin enforcement of the repealer of Section 611 and gave judgment for the defendants. *Id.* at 72a.[2]

6. While this federal court suit was pending, the question whether the repeal of Section 611 had been precleared was also being litigated through the state court system. On December 12, 1990, the Mississippi Supreme Court decided *Greenville Public School District* v. *Western Line Consolidated School District*, 575 So. 2d 956 (1990), cert. denied, 112 S. Ct. 1512 (1992). In that case, which did not involve the Hattiesburg school district, the Mississippi court held that it had

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[1] The result of the requested injunction would be that Section 611 would remain in effect. As a consequence, Hattiesburg's annexation of neighboring territory from Forrest and Lamar Counties would result in that territory automatically becoming part of the Hattiesburg municipal school district.

[2] The result of this decision was that the territory annexed by Hattiesburg did not become part of the Hattiesburg municipal school district, but remained part of the county school districts to which it belonged prior to the annexation.

concurrent jurisdiction with local, three-judge federal district courts to determine whether the repeal of Section 611 had been precleared pursuant to Section 5 of the Voting Rights Act. 575 So. 2d at 959.

On the merits, the state court agreed with the three-judge district court's holding that the repeal of Section 611 had been precleared in 1986. The state court held that the Attorney General had in effect precleared the repeal of Section 611 when he precleared Section 52. According to the state court, "[e]ven assuming [Section 611] was not specifically repealed [by Section 47], it was implicitly repealed by [Section 52]." 575 So. 2d at 963. In the state court's view, Section 52 was "a subsequent enactment covering a field of operation co-existent with [Section 611]" that "cannot by any reasonable construction be given effect while the prior law remains in existence because of irreconcilable conflict between the two acts." *Ibid.* In that situation, the court held, a "repeal * * * arise[s] by necessary implication from the enactment of a subsequent act." *Ibid.*

7. An appeal of the three-judge district court's initial decision in this case reached this Court at approximately the same time as did the petition for a writ of certiorari from the Mississippi Supreme Court's decision in *Greenville Public School District.* This Court vacated the judgment of the district court and remanded "for further consideration in light of *Clark v. Roemer*, 500 U.S. [646] (1991)." *Dupree* v. *Moore*, 112 S. Ct. 1462 (1992) (see J.S. App. 74a). The Court denied certiorari in *Greenville Public School District.* 112 S. Ct. 1512 (1992).

8. On remand, the three-judge district court held that the State's submission of the 1986 Uniform School Law had not presented to the Attorney General for preclearance either of the two provisions of that Act (Sections 47 and 52) identified by the State as having

repealed Section 611. The court relied on *Clark* v. *Roemer*, 500 U.S. 646 (1991), which had held that "any ambiguity in the scope of a preclearance request must be resolved against the submitting authority," *id.* at 656, and that a State "must identify with specificity each change that it wishes the Attorney General to consider" in a Section 5 preclearance submission, *id.* at 658.

Applying those principles, the district court held that when the State submitted the Uniform School Law in 1986, the State had clearly and unambiguously submitted only those 13 sections it specifically had identified in its submission as affecting voting. J.S. App. 20a. Because the State had not specifically identified Section 47, which expressly repeals Section 611, the voting change contained in that section was held not to have been properly submitted.

With respect to Section 52, the court recognized that the State had specifically identified Section 52 in its initial Section 5 submission in 1986. But, the court noted, the State's 1986 submission did not explain that Section 52 had any effect on Section 611. The Attorney General accordingly could not have known at the time of the submission that Section 52 repealed Section 611 "by implication." Thus, the district court held that that "implicit repeal" was not submitted under Section 5 and, consequently, had not been precleared. J.S. App. 20a-21a & n.10. The district court concluded that to "permit Mississippi to submit a haystack of documents and obligate the Attorney General to painstakingly search for any voting change needle" would be inconsistent with the "clear pronouncement" of this Court in *Clark*. *Id.* at 22a. Accordingly, the court held that "[t]he repealer of [Section 611] is hereby found to be ineffective and unenforceable" unless and until the State obtains preclearance. *Id.* at 37a.

Circuit Judge Barksdale dissented. J.S. App. 23a-34a. In his view (*id.* at 25a-26a), the facts surrounding the initial attempt to preclear Mississippi's 1986 Uniform School Law were distinguishable from those in *Clark* and its precursor, *McCain* v. *Lybrand*, 465 U.S. 236 (1984), because the State here sent a copy of the actual legislation for which preclearance was sought with its request for preclearance. J.S. App. 29a. In Judge Barksdale's view, the submission therefore at least put the Attorney General on notice of the existence of the two sections that repealed Section 611. *Id.* at 30a-33a. For that reason, Judge Barksdale would have ruled that the repeal of Section 611 was adequately submitted and precleared because no timely objection had been interposed by the Attorney General.

9. Defendants moved the district court for a new trial, to alter or amend the court's order, or for a new remedy. J.S. App. 227a-232a, 233a-238a. They alleged, *inter alia*, that the court had failed to render judgment "upon the whole case or for all the relief asked," *id.* at 234a,[3] and that the court should have fashioned relief that would have precluded only the voting change effected by the repeal of Section 611, while permitting the balance of the repeal of Section 611 to go into effect. See *id.* at 228a-229a, 234a-235a. In practical terms, granting defendants' motion apparently would have meant that the children in the area annexed by Hattiesburg would continue to go to school in their pre-annexation, county school districts and that the residents of the annexed area would continue to pay school taxes to those pre-annexation districts, while the residents of the annexed area would lose their right to vote for the county school board to

[3] In fact, the district court failed to enter a separate judgment, as required by Fed. R. Civ. P. 58.

which they paid taxes and whose schools their children attended. The district court summarily denied defendants' motion. *Id.* at 1a-2a.

DISCUSSION

This Court has requested the United States to address the following question:

> In light of the Mississippi Supreme Court's holding in *Greenville Public School District* v. *Western Line Consolidated School District*, 575 So.2d 956 (Miss. 1991), that Miss. Code Ann. § 37-7-103 (1972 & Supp. 1990) supersedes Miss. Code Ann. § 37-7-611 (1972) and repeals it by implication, what remedy, if any, can a federal court offer for failure to preclear section 47 of the Education Reform Act, 1986 Miss. Gen. Laws ch. 492, which also purported to repeal § 37-7-611?

In *Greenville Public School District*, the Mississippi Supreme Court held that Section 52 of the Uniform School Law implicitly repealed Section 611. 575 So. 2d at 963. That ruling conclusively determines the effect of Section 52 on Section 611 as a matter of state law. See J.S. App. 20a-21a & n.10. Since the repeal of Section 611 would be a change in law affecting voting in a covered jurisdiction, however, it must be precleared before it can be enforced; that is true whether the repeal is by implication (as with Section 52) or is done explicitly (as in Section 47). We therefore agree with the district court that any voting change caused by the repeal of Section 611 may not be enforced, and the district court's ruling on the merits in this case should therefore be summarily affirmed. The repeal of Section 611, however, has important state law consequences other than its effect on voting. The repeal determines the schools that children in the area annexed by Hattiesburg attend and

the school district to which residents of the annexed area pay taxes. These non-voting consequences create a significant remedial issue that in our view warrants a remand to the district court for further proceedings.

1. Mississippi is a jurisdiction that is covered under Section 5 of the Voting Rights Act. Accordingly, before the State may put into effect any state law that makes a change affecting voting, it must either obtain pre-clearance from the Attorney General of the United States or it must bring an action in the United States District Court for the District of Columbia, seeking a declaration that the new state law "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. 1973c. If the Attorney General fails to interpose an objection, or if the State obtains the declaratory judgment, the State may put the new law into effect. If neither of those events occurs, the State may not.

In this case, the State did not seek judicial preclearance of the repeal of Section 611. Since the repeal of Section 611 would be a change in state law affecting voting, the enforceability of the repeal, insofar as it affects voting, therefore depends on whether the Attorney General ever precleared it. If the Attorney General precleared the repeal of Section 611, then the State may enforce that repeal and cease to apply Section 611. That would be true regardless of whether the Attorney General precleared the "express" repeal of Section 611 (by Section 47 of the Uniform School Law) or the "implied" repeal of Section 611 (by Section 52 of the Uniform School Law). But if the Attorney General did not preclear either the express repeal or the implied repeal of Section 611, then the State may not put any voting change effected by that repeal into effect.

The district court in this case correctly ruled that neither the express nor the implied repeal of Section 611 had ever been precleared. That conclusion follows from this Court's decision in *Clark*. In *Clark*, the district court had held that certain voting changes made by earlier enactments and never submitted for preclearance were in effect precleared when the Attorney General precleared later legislation incorporating the earlier changes. This Court held, however, that the preclearance of the later legislation did not operate to preclear the earlier changes, because the State had never identified the earlier changes in the preclearance papers it submitted to the Attorney General. The Court ruled that "a submission pertains only to *identified* changes in that legislation" and that "any ambiguity in the scope of a preclearance request must be resolved against the submitting authority." 500 U.S. at 656 (emphasis added).

In this case, the State's initial 1986 Section 5 submission of the Uniform School Law to the Attorney General failed to identify Section 47 as a provision that made a voting change; the only information provided concerning the effect of Section 47 was the statutory language stating that it repealed prior provisions that "provide for the creation and operation of municipal separate school districts." J.S. App. 121a. That statement did not refer to any voting change. The State thus did not "identify with specificity," *Clark*, 500 U.S. at 658, that Section 47's repeal of Section 611 made a voting change. Moreover, "any ambiguity in the scope of a preclearance request must be resolved against the submitting authority." *Clark*, 500 U.S. at 656 (citing *McCain*, 465 U.S. at 257). Since the State's submission could not be found to have unambiguously identified the voting change effected by the repeal of Section 611, the

Assistant Attorney General's letter, stating that he did "not interpose any objection to the voting changes occasioned by [the Uniform School Law], as identified in [the State's] July 22, 1986, letter," J.S. App. 156a, did not operate to preclear the repeal of Section 611.

As the district court in this case correctly held, the same conclusion follows with respect to what the Mississippi Supreme Court in *Greenville Public School District* termed the "implied repeal" of Section 611 that occurred when Section 52 of the Uniform School Law was enacted. Although the text of Section 52 (unlike the text of Section 47) was submitted as a voting change, the explanation of that change was that it provides for alteration of school district boundaries—including municipal school district boundaries—with the consent of the school boards involved. See J.S. App. 83a. Since nonmunicipal school boards are elected, the alteration of their boundaries is a change affecting voting. *Perkins* v. *Matthews*, 400 U.S. 379 (1971). Nothing in the text of Section 52 or in the State's submission, however, stated that Mississippi law had previously provided in Section 611 for nonconsensual expansion of municipal school district boundaries, or that the new method provided for in Section 52 would preclude the application of Section 611 and would henceforth be the *sole* method for altering school district boundaries. Therefore, as the district court held, "even if Section 52 in effect amounted to a repeal of [Section 611] by operation of state law, that fact was not submitted to the Attorney General in 1986 nor reviewed by him as such." J.S. App. 20a-21a.

The district court's conclusion that Section 611 was not repealed insofar as it affects voting conflicts with the conclusion reached by the Mississippi Supreme Court in *Greenville Public School District* that Section 52 impliedly repealed Section 611 and that Section 52's

effect on voting *was* precleared under Section 5 of the Voting Rights Act. The Mississippi Supreme Court has the last word on the meaning of Section 52 as a matter of state law. But it does not have the final word on the interpretation of Section 5 of the Voting Rights Act or on the effect of Section 5 on the attempted repeal of Section 611, both of which are issues of federal law. As we explained in our submission to this Court in response to its invitation in the *Greenville Public School District* case itself, a state court decision does not constitute binding precedent on the lower federal courts on a question of federal law. See 90-1861 U.S. Br. 17-18. See also *Standard Oil Co.* v. *Johnson*, 316 U.S. 481, 483 (1942).[4] It would be particularly inappropriate to recognize any such final state court authority over an issue of federal law where, as here, Congress has expressly provided that three-judge federal district courts be the forum for the litigation of the federal issue involved.[5] Nor could the Mississippi Supreme Court's ruling in *Greenville Public School District* have any res judicata effect on the plaintiffs in this case, who were not

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[4] In addition, the Mississippi Supreme Court decided *Greenville Public School District* prior to this Court's clarification of the governing legal standards in *Clark*, so that its precedential weight would in all events be subject to doubt.

[5] Section 5 provides that "[a]ny action under this section shall be heard and determined by a court of three judges * * * and any appeal shall lie to the Supreme Court." 42 U.S.C. 1973c. We recognize that this provision does not preclude a state court from deciding a Section 5 coverage issue that is collateral to an action otherwise properly before it. See *Hathorn* v. *Lovorn*, 457 U.S. 255 (1982). As we stated in our submission to this Court in *Greenville Public School District*, however, there is substantial doubt that the state court had jurisdiction to decide the Section 5 coverage issue in that case, since it was not merely collateral to a state-law claim otherwise before the court. See 90-1861 U.S. Br. 15-19.

parties there. See *Hathorn* v. *Lovorn*, 457 U.S. 255, 269 n.23 (1982). Accordingly, the Mississippi Supreme Court's decision in *Greenville Public School District* has no effect on the remedy that the federal court may order in this case.

2. There remains the question of what remedies may be ordered by the three-judge district court for the State's failure to obtain preclearance of the repeal of Section 611. Section 5 requires preclearance of changes affecting voting in covered jurisdictions. *Connor* v. *Waller*, 421 U.S. 656 (1975) (per curiam); *United States* v. *Board of Supervisors*, 429 U.S. 642, 645 (1977) (per curiam). Therefore, "[i]f voting changes subject to § 5 have not been precleared, § 5 plaintiffs are entitled to an injunction prohibiting the State from implementing the changes," *Clark*, 500 U.S. at 652-653, at least absent "extreme circumstance[s]" of a sort not present here, *id.* at 654.

Where, as in this case, an unprecleared law operates to make both a change affecting voting and a change that does not affect voting, the question of how to fashion a remedy becomes more complex. In this kind of case, the Section 5 court is in much the same position as a court that has found a portion of a state statute to be unconstitutional or otherwise invalid as a matter of federal law. The remedial determination in such a case depends on whether the portion of the statute that is not invalid is severable, as a matter of state law, from the portion that is invalid. Cf., *e.g.*, *United States Dep't of Treasury* v. *Fabe*, 113 S. Ct. 2202, 2212 & n.8 (1993); *Wyoming* v. *Oklahoma*, 502 U.S. 437, 459-461 (1992); *City of Lakewood* v. *Plain Dealer Publishing Co.*, 486 U.S. 750, 772 (1988); *Weaver* v. *Graham*, 450 U.S. 24, 36 n.22 (1981); *Railroad Retirement Bd.* v. *Alton R.R.*, 295 U.S. 330 (1935); *Williams* v. *Standard Oil Co.*, 278 U.S. 235,

241 (1929). If it is severable, the court should issue relief directed to the invalid portion (here, the voting change) and permit other portions of the statute (here, the non-voting changes in state law made by the statute) to go into effect. See *Dotson* v. *City of Indianola*, 514 F. Supp. 397, 403 (N.D. Miss. 1981), aff'd mem., 456 U.S. 1002 (1982). If the court finds that the valid portion of the statute is not severable, the court should direct its relief to operation of the entire statute.

The repeal of Section 611 changed state law in ways that affected voting, because it altered the school district in which people living in areas annexed by a city would vote.[6] Had there been no repeal, people living in the annexed areas would no longer vote in their pre-annexation school district, since the area in which they live would no longer be part of that district. Under the repeal, however, they would continue to vote in the pre-annexation school district, since (absent the consent of both districts involved) they would still live in it.

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[6] Appellants in No. 94-82 claim (J.S. 13-14) that plaintiffs in this case—members of the Hattiesburg school board and voters in Hattiesburg—lack standing. As we understand it, appellants assert that plaintiffs were not injured by the failure to preclear the repeal of Section 611 because plaintiffs' votes will be unaffected by the only remedy to which they would be entitled in this case—an order that those living in the annexed territories will no longer be able to vote in elections for the school board of their pre-annexation school district. As we explain below, however, it is possible that broader relief than this would be appropriate. See pp. 18-19, *infra*. Plaintiffs also claim that some city voters are being permitted to vote in the pre-annexation, county school districts as well as in city elections, while other city voters can vote only in city elections, and they seek a remedy to redress that alleged inequality. See, *e.g.*, *Heckler* v. *Mathews*, 465 U.S. 728, 738 & n.4 (1984) (citing cases).

But the repeal of Section 611 also changed state laws in significant ways that did *not* affect voting. Had there been no repeal, children in an area annexed by a municipality would attend the city's schools and residents of the annexed area would pay taxes to support those schools.[7] Under the repeal (and, again, absent the necessary consent), the children in the annexed area would continue to attend schools operated by the pre-annexation school district and residents in the annexed area would continue to pay taxes to the pre-annexation school district. Those effects on school attendance and taxation are not themselves changes in state law affecting voting. It would therefore be theoretically possible to implement the non-voting changes made through the repeal of Section 611 (the changes in school attendance and taxes) while not implementing the voting changes. If this were done, the annexed area would remain in the county school districts for all purposes except voting.

The district court in this case held that "[t]he repealer of [Section 611] is hereby found to be ineffective and unenforceable." J.S. App. 37a.[8] That holding appears to

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[7] With regard to taxation, Mississippi law generally provides that a minimum education tax, supplemented by an additional amount authorized by the school board, be imposed on property within a school district and be paid to the school district. See Miss. Code Ann. §§ 37-57-1, 37-57-105 (1990 & Supp. 1994).

[8] In this case, it appears that the district court gave plaintiffs only a declaratory judgment—not an injunction—as a remedy. That may well have been because the Hattiesburg school district is operating under a continuing desegregation order, and the city school board must obtain the permission of the desegregation court before it may change its boundaries. See 94-66 J.S. 29 n.10; 94-66 & 94-82 Mot. to Aff. 18 n.6. The basic remedial principles set forth in the text, however, apply equally to injunctions and declaratory judgments. If the non-voting effects of the new law are severable,

constitute a conclusion that the repeal of Section 611 is unenforceable in its entirety. Before reaching that conclusion, however, the district court should have determined whether the non-voting changes effected by the repeal of Section 611 were—as a matter of state law—severable from the voting changes.[9] There is no indication in the district court's opinion that it undertook such a determination. (Although the issue was raised by appellants in their motions to alter or amend the order, the district court summarily denied those motions.) Therefore, we agree with appellees that this case should be remanded to the district court with instructions to determine whether the repeal of Section 611 should be declared invalid in its entirety, or whether the repeal of Section 611 should be declared invalid only insofar as it affects voting, permitting the pupil assignment and taxation issues to be governed by the new state law.

We do not mean to suggest that a conclusion that the repeal of Section 611 should be unenforceable in its entirety was incorrect. There is, in fact, a strong argument that the non-voting aspects of the repeal of Section 611 are not sensibly severable from the voting change effected by that repeal. If the non-voting aspects

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the district court should issue a declaration that only the voting aspects of the repeal of Section 611 may not be enforced. If the non-voting effects of the new law are not severable, the district court should issue a declaration that the entire repeal of Section 611 is not enforceable.

[9] There may also be federal constitutional issues that would be raised if a State decided not to permit residents of a school district to vote in school board elections. See *Kramer* v. *Union Free School District No. 15*, 395 U.S. 621 (1969). The district court would of course have to take any such issues into account in determining the severability issue.

of the repeal were permitted to proceed, but the voting change was not enforceable, the citizens of the annexed territories would be left in a highly unusual position. They would continue to send their children to the schools run by their pre-annexation, county school boards and they would continue to pay property taxes to support those schools, but they would be unable to vote for membership on those school boards. That situation would be sufficiently anomalous that it could lead to a conclusion that the state legislature would not have intended it—*i.e.*, that the non-voting aspects of the repeal of Section 611 are not severable from the voting aspects.

Although the district court's remedial order thus may well have been correct, we think that, in the absence of any reason to believe that the district court engaged in any analysis of the severability issue, it would be appropriate to remand the case to the district court for further remedial proceedings. Those proceedings would be directed to the question of the severability of the non-voting aspects of Section 611 from the voting aspects of the statute. If there is some means to obtain a definitive resolution of that issue as a matter of state law from the state courts, the district court may want to make use of it.[10] In the absence of any such means, the district court, which sits in Mississippi and whose judges must regularly address state-law issues in other contexts, is

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[10] Rule 20 of the Rules of the Mississippi Supreme Court provides for certification of questions of law to that court "from the [United States] Supreme Court or * * * any United States Court of Appeals." Although this rule does not provide for certification requests from a federal district court, no provision of state law expressly precludes acceptance of a certified question from such a court.

in the best position to make that determination in the first instance.

CONCLUSION

The district court's determination that the repeal of Section 611 was not precleared is controlled by this Court's decision in *Clark* v. *Roemer* and should be summarily affirmed. The case should be remanded to the district court for further remedial proceedings to inquire into whether, as a matter of state law, the non-voting aspects of the repeal of Section 611 are severable from the effects on voting of the repeal of Section 611.

Respectfully submitted.

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